UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

21842

SWANSON PAINTING COMPANY,

Appellant,

vs.

PAINTERS LOCAL UNION NO. 260,

Appellee.

Appeal From The United States District

Court For The District Of Montana

Great Falls Division

The Honorable Russell E. Smith, District Judge

APPELLANT'S BRIEF

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STATEMENT OF PLEADINGS

This is an action commenced by the appellees in the Federal District Court of Montana, Great Falls Division, by the filing of a Complaint in said Court on January 11, 1967. Service of process was made on the appellant by use of the Montana "Long Arm" statute and the Summons and Complaint were served upon the appellant in Washington by a United States Marshal. On January 26, 1967, the appellant noted for hearing a Motion to Quash Service of Process, or in the alternative, to Change Venue to the Western District of Washington, Northern Division.

Appellants motions were subsequently denied, however, the District Court certified that there existed substantial ground for differences of opinion and allowed for an immediate application for an interlocutory appeal pursuant to 28 USC 1292(b) and Rule on Appeal 38.

JURISDICTION OF DISTRICT COURT

Jurisdiction of the Montana District Court is alleged to exist by virtue of Section 301 of the Labor Management Relations Act, as amended (hereafter referred to as 29 USC 185), and Rule 4 (e) of the Federal Rules of Civil Procedure.

Jurisdiction of the Montana District Court is alleged to exist under 29 USC 185 (a) and (c) which provide:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations may be brought in any district court of the divided states having jurisdiction of the parties, without respect to the amount in controversy or withour regard to the citizenship of the parties."
>
> "(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

Personal jurisdiction over the appellant is alleged to exist by virtue of service of process upon the appellant in the State of Washington pursuant to Rule 4 (e) FRCP, which provides in pertinent part:

". . . Wherever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

Rule 4 B (1) (a) of the Montana Rules of Civil Procedure (MRCP) provides in part:

"(1) Subject to jurisdiction. All persons found within the State of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, although an employee, or through an agent, of any of the following acts:

(a) The transaction of any business within this state;"

STATEMENT OF THE CASE

The appellee, Painters Local Union No. 260, plaintiff below, filed this action on January 11, 1967, in the District of Montana (Tr. Vol. 1, Pg. 1). Its Complaint alleges the violation of an industry wide collective bargaining agreement between an employer group and a group of labor organizations (Tr. Vol. 1, Pg. 3). It asserts the right of recovery, based in part upon 29 USC 185 (a), otherwise known as Section 301 (a) of the Labor Management Relations Act, as amended.

The appellant, defendant below, is and was a painting contractor who had a defense contract to do certain painting work on a

federal military reservation or enclave known as Malmstrom Air Force Base (Tr. Vol. 2, Pg. 6). This contract required the painting of some 300 housing units and the repairing of 31 carport slabs, all of which were located within the aforementioned military reservation.

The plaintiff, apparently believing itself to be a third-party beneficiary of the Washington Agreement, claimed that it was harmed by an alleged violation by the defendant of the provisions of certain local rules under what was called a local "Great Falls" bargaining agreement (Tr. Vol. 1, Pg. 2-3). The plaintiff claimed that defendant was required to observe the local rules by virtue of being a signatory to an agreement in effect in western Washington, where the defendant resides and has its principal place of business.

Defendant is incorporated in Washington and is now and at all times material hereto had its principal place of business in western Washington. Defendant has never been licensed to do business in the State of Montana and has, in fact, only been in Montana in connection with the performance of the above mentioned government contract at Malmstrom Air Force Base. Defendant completed its contract in August of 1966 and immediately thereafter returned with all its equipment and employees to western Washington. While at Malmstrom Air Force Base, the defendant did hire some local employees and the plaintiff claims such hiring to have been in violation of the "Great Falls" Agreement (Tr. Vol. 1, Pg. 3).

Plaintiff made service of process upon the defendant in western Washington on January 16, 1967 (Tr. Vol. 1, Pg. 21-21a). On January 26, 1967, the defendant noted for hearing its Motion to Quash

Service of Process, or in the alternative, to Change Venue to the Western District of Washington, Northern Division (Tr. Vol. 1, Pg. 22). Defendants motions came on for hearing on March 14, 1967, and the same were denied (Tr. Vol. 2, Pg. 21), with the leave and certification by the Court, pursuant to 28 USCA 1292, to pursue an interlocutory appeal (Tr. Vol. 1, Pg. 44).

The questions presented in the defendant's motion in District Court and in this appeal are as follows:

(1) May the conduct of a party which occurs within the confines of a federal enclave over which the United States of America has exclusive legislative jurisdiction be subject to the local state rules of civil procedure governing extra-territorial service of process under a long-arm statute, and

(2) Does conduct and activity with regard to the performance of a government contract, exclusively on and within a federal enclave, with exception of the hiring of certain local employees, meet the "minimum contacts" requirement so as to allow extra territorial service of process without violation of the due process requirements of the 14th Amendment to the U. S. Constitution, and

(3) Does 28 USCA 1391 (b) governing venue generally control the proper venue in a cause in which the Complaint and right of action is asserted under 29 USCA 185 (a) and (c), and

(4) Does 28 USCA 1391 (c) which allows for suit against a corporation in any district in which it "is doing business" allow for a suit in said district when the corporation has ceased to do business in said district at the time of commencement of an action and service of process.

SPECIFICATION OF ERRORS

The District Court of Montana errored in its decision in the following respects.

(1) In finding that the conduct of the defendant at Malmstrom Air Force Base met the "minimum contact" requirements so as to allow extra territorial service of process without violating provisions of the 14th Amendment of the United States Constitution.

(2) In finding that the state rules of civil procedure apply to conduct on and within a federal enclave.

(3) In finding that venue for this suit was proper in the District Court of Montana, rather than in the Western District of Washington, Northern Division.

ARGUMENT OF APPELLANT

Jurisdiction

Considering first the question of jurisdiction, it is the position of the appellant that when jurisdiction is asserted via what is commonly referred to as a "long-arm" statute, whether a state or federal

court, due process of law requires that there must have been the required minimum contact between the defendant and the locus of the forum so as to not violate "fundamental fairness test" as set forth in International Shoe Company v. State of Washington, 326 U.S. 310 (1945); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952); McGee v. International Life Insurance Co., 355 U.S. 220 (1957); Travelers Health Ass'n. v. Com. of Virginia ex rel. State Corporation Comm., 339 U.S. 643 (1958); and Hanson v. Denckla, 357 U.S. 235 (1958).

It is appellant's position that by entering into the contract with the Department of Defense, which contract was performed on and exclusively within a federal enclave, Malmstrom Air Force Base, and that the only contact with the State of Montana was to hire certain local residents, that these "contacts" are not sufficient under the test as set forth in Hanson v. Denckla, supra, at Page 253. There the Supreme Court said:

> "The application of that rule (requirement of contact with the forum state) will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." (emphasis added).

In the instant case, the appellant was not licensed to do business in the State of Montana, did not in fact do any business in said state, but was working solely for the Federal Government within a federal enclave. Of significance regarding this latter point is the fact

that in the event of any dispute concerning the appellant's contract, the Federal Law and the Federal Courts would be invoked and not the laws or courts of Montana.

Two cases in point on this question of activities within a federal enclave are Knott Corp. v. Furman, 163 F. 2d 199, certiorari denied, 332 U.S. 809, 68 S.Ct. 111, 92 L. Ed. 387 (1947); and Ackerley v. Commercial Credit Co., 111 F. Supp. 92 (1953).

The Knott case involved a hotel which was maintained on a military reservation and a person was injured while a guest at the hotel. The court said that the defendant was doing business in the State of Virginia for jurisdiction purposes, even though the business was within a federal enclave, but this result was reached because the contact with citizens of said state was the same as any other corporation doing business in Virginia. The use of the hotel was not restricted to military personnel, but open to all visitors on the reservation.

The Ackerley case involved a suit for wrongful death wherein one of the defendants, Ibrandtsen Company, Inc., in arguing its Motion to Dismiss for Lack of Jurisdiction, urged that its activities in New Jersey within a federal enclave should be ignored in deciding if it was doing business in New Jersey. The court answered in the negative citing the Knott case, supra, but specifically found that Ibrandtsen Company did carry on substantial activities within New Jersey that were not on a federal enclave.

It is submitted that the above two cases differ substantially on their facts from the instant case, because the defendant here never engaged in any activity outside of Malmstrom Air Force Base, whereas in the Knott and Ackerley cases, the defendants activities were shown to be substantially involved with the citizens of the state in which the enclave was located.

Further, Article 1, Section 8, Clause 17, of the United States Constitution provides with regard to control and jurisdiction of federal enclaves for the United States:

> "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings, . . . (emphasis supplied).

This constitutional declaration could not be broader or clearer and by virtue of it any other authority, other than that of Congress, is excluded. Ft. Leavenworth R. Co. v. Lowe, S.Ct. 995, 114 U.S. 525, 532, 29 L.Ed. 264 (1885); Surplus Trading Co. v. Cook, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091 (1930). Likewise such enclaves, particularly military reservations, do not contsitute a part of the state in which they are located for general jurisdictional purposes. Murphy v. Lowe, (C.A. Kan 1957) 249 F.2d 783, certiorari denied, 78 S.Ct. 544, 355 U.S. 958, 2 L.Ed. 533.

The above adequately points out that the Montana Civil Rules of Procedure, in particular, Rule 4 B(1)(a) known as the Montana "Long-Arm" statute, will not be effective to obtain jurisdiction of the appellant because its activities were not in Montana, but within a federal enclave, and secondly, because the State of Montana does not have legislative jurisdiction over the area or activities within a federal enclave.

VENUE

The question of venue for the commencement of a civil action in Federal District Court is controlled by 28 USCA 1391, the pertinent subsection thereof providing:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

The Complaint of the appellee states that its action is based upon 29 USCA 185(a), (Section 301(a) of the Labor Management Relations Act, as amended). The affidavit of the appellant demonstrates that it has its principal place of business in western Washington, that it did not maintain any agent, offices or employees in the State of Montana, nor was it licensed or qualified to do business in Montana. These facts are not now, nor have they been controverted by the appellee.

Therefore, unless "otherwise provided by law" as set forth in 28 USC 1391, supra, venue must lie in the Western District of

Washington, Northern Division.

The appellee in his brief and argument in the District Court of Montana argues that venue other than that specific in 28 USC 1391 is provided for in 29 USC 185(c) wherein it is stated:

> "For the purposes of actions and proceedings by or against labor organizations in the District Courts of the United States, District Courts shall be deemed to have jurisdiction of a labor organization (1) in the District in which such organization maintains its principal office, or (2) in any District in which its duly authorized officers or agents are engaged in representing or acting for employee members."

This provision does admittedly grant increased jurisdiction over labor organizations, but it is the appellants contention that this relaxation or extension of venue requirements does not affect other individuals or entities involved in controversies with labor organizations.

The interpretation of this section is correctly and succinctly set forth in International Ass'n. of Machinists v. Smiley, (1948) 76 F. Supp. 800, wherein the Court stated at Page 801.

> "Section 301 (c) specifically limits its relaxation of venue requirements to grant increased jurisdiction over a labor organization. It does not grant jurisdiction to the Court over other parties who are inhabitants of another District and who do not waive their right to insist on proper venue."

See also Dixie Carriers, Inc. v. Nat'l. Maritime Union of America, AFL-CIO, 35 FRD 365 (1964).

The last consideration to be made with regard to venue is the applicability and interpretation of 28USC 1391 (c) which provides as follows:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

A diversity of opinion exists with regard to the time applicable to the phrase "doing business". In the instant case, it is not controverted that the appellant was not licensed to do business in Montana, nor that it was not incorporated or present in said state at the time that this action was commenced. It may be contended, however, that the phrase "doing business" applies to the time during which the cause of action arose. Although as contended by the appellant at the outset of its brief, it was not doing business in Montana, but rather acting on and within a federal enclave. For the sake of discussion of 28 USC 1391 (c), it will be assumed that it was doing business in Montana at the time the cause of action arose.

It should, however, be borne in mind that the appellant was not engaged in any activities at Malmstrom Air Force Base, or anywhere else in Montana, at the time that the appellee commenced this suit, or served the appellant in Washington.

Some courts have interpreted 1391 (c) as allowing for venue in the district where the corporation was "doing business" at the time the cause of action arose. Nelson v. Victory Elec. Works, Inc., (1962) 210 F. Supp. 954, and Farmers Elevator Mutual Insurance Co. v. Carl J. Austad & Sons, Inc., (1965) 343 F. 2d 7. A reading of these cases reveals that the Nelson case actually was decided on the basis of the defendant's failure to timely raise the question of improper venue and the Farmers

case, supra, cites the Nelson case as authority for the same interpretation of this phrase.

The better reasoned cases hold that the meaning of the phrase "doing business" as read in the context of 28 USC 1391 (c) is in the present tense and an uncontorted reading thereof requires that the phrase be held to mean "doing business" at the time of the commencement of the suit.

As stated in Satterfield v. Lehigh Val. R. Co., (1955) 128 F.Supp. 699 at Page 670:

> "This court has personal jurisdiction over Millard and venue was properly laid in this district if Millard was 'doing business' in this district at the time of the alleged service of process upon it, 28 USC 1391 (c)."

Accord Hall v. Rubin, (1965) 240 F.Supp. 490; Brewer v. Rubin, (1965) 240 F.Supp. 467; Powell v. Sealectro, Inc., (1962) 205 F. Supp. 6.

To interpret the language of 28 USC 1391 (c) other than as meaning "doing business" at a time the time of the commencement of the action would do violence to the clear and unambiguous language of said section.

Based upon the foregoing authorities and reasons, it is respectfully urged that the decision of the District Court of Montana be reversed and that the service of process upon the appellants be quashed, or in the alternative, that this action be dismissed or venue

transferred to the Western District of Washington, Northern Division, pursuant to the provision of 28 USC 1406.

Respectfully submitted,

GUTTORMSEN, SCHOLFIELD, WILLITS & AGER

By_____
Attorneys for Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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vs.	)	NO. 21842
PAINTERS LOCAL UNION NO. 260, Appellee.	)	

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GUTTORMSEN, SCHOLFIELD, WILLITS & AGER

By_____
Of Attorneys for Appellant